

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

DONALD RAY MALENA, 1114314,)	
Petitioner,)	
)	
v.)	No. 3:06-CV-1808-B
)	ECF
NATHANIEL QUARTERMAN,)	
Director TDCJ-CID,)	
Respondent.)	

**FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

This case has been referred to the United States Magistrate Judge pursuant to 28 U.S.C. § 636(b) and a standing order of reference from the district court. The Findings, Conclusions and Recommendation of the Magistrate Judge are as follows:

I. Background

On July 12, 2002, Petitioner pled guilty to robbery, enhanced by a prior felony conviction. *State of Texas v. Malena*, No. F02-49159-UH (Crim. Dist. Ct. No. 1, Dallas County, Texas, July 12, 2002). On July 31, 2003, the Fifth District Court of Appeals affirmed Petitioner's conviction. *Malena v. State*, No. 05-02-01325-CR (Tex. App. – Dallas, July 31, 2003, no pet.). Petitioner did not file a petition for discretionary review.

On November 9, 2005, Petitioner filed a state application for writ of habeas corpus. *Ex parte Malena*, Application No. 64,482-01. On August 9, 2006, the Court of Criminal Appeals denied the petition without written order on the findings of the trial court.

On September 26, 2006, Petitioner filed this federal petition. He argues that his guilty

plea was not knowingly and voluntarily entered.

On January 9, 2007, Respondent filed a preliminary response arguing that the petition is time-barred. On February 1, 2007, Petitioner filed a reply. The Court now determines the petition is barred by limitations and should be dismissed.

II. Discussion

A. Statute of Limitations

Petitioner filed his § 2254 petition after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Therefore, the AEDPA governs the present petition. *See Lindh v. Murphy*, 521 U.S. 320 (1997). The AEDPA establishes a one-year statute of limitations for federal habeas proceedings. *See* Antiterrorism and Effective Death Penalty Act, Pub.L. 104-132, 110 Stat. 1214 (1996).

In most cases, the limitations period begins to run when the judgment becomes final after direct appeal or the time for seeking such review has expired. *See* 28 U.S.C. § 2244(d)(1)(A).¹

¹The statute provides that the limitations period shall run from the latest of--

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking direct review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

This period is tolled while a properly filed motion for state post-conviction relief or other collateral review is pending. *Id.* § 2244(d)(2).

On July 31, 2003, the Fifth District Court of Appeals affirmed Petitioner's conviction. He did not file a petition for discretionary review. His conviction therefore became final thirty days later, on September 2, 2003.² *See Tex. R. App. P. 68.2* (PDR must be filed within 30 days after court of appeals renders judgment or overrules motion for rehearing); *see also Roberts v. Cockrell*, 319 F.3d 690, 694-95 (5th Cir. 2003) (state conviction becomes final for limitations purposes when time for seeking further direct review expires, regardless of when mandate issues). Petitioner then had one year, or until September 2, 2004, to file his federal petition.

The filing of a state application for habeas corpus tolls the statute of limitations. *See 28 U.S.C. § 2244 (d)(2)*. On November 9, 2005, Petitioner filed a state habeas application. This application was filed after the one-year limitations period expired. It therefore did not statutorily toll the limitations period.

Petitioner's federal petition was due by September 2, 2004. He did not file his federal petition until September 26, 2006. His petition is therefore untimely.

B. Equitable Tolling

The one-year limitation period is subject to equitable tolling in "rare and exceptional cases." *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998); *see also Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999) (asserting that courts must "examine each case on its facts to determine whether it presents sufficiently 'rare and exceptional circumstances' to justify

²Thirty days from July 31, 2003, is Saturday, August 30, 2003. Pursuant to Tex. R. App. P. 4(a), the PDR was due on Tuesday, September 2, 2003 (allowing for the weekend and Labor Day).

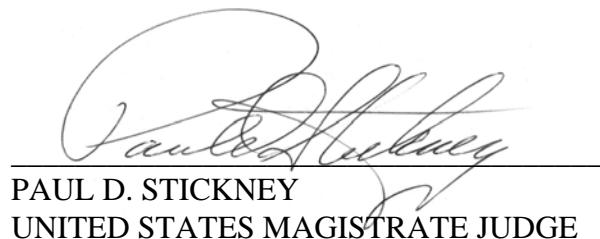
equitable tolling" (quoting *Davis*, 158 F.3d at 811)). The Fifth Circuit has held that " '[e]quitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights.' " *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir.1999) (quoting *Rashidi v. American President Lines*, 96 F.3d 124, 128 (5th Cir.1996)). Petitioner bears the burden of proof to show he is entitled to equitable tolling. *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000).

Petitioner argues he is entitled to equitable tolling because he is actually innocent. Actual innocence, however, is not a proper basis for equitable tolling. *See Felder v. Johnson*, 204 F.3d 168, 171-72 (5th Cir. 2000) (finding actual innocence claims do not support equitable tolling of the AEDPA statute of limitations). Petitioner has failed to show rare and exceptional circumstances justifying equitable tolling in this case.

RECOMMENDATION:

The Court recommends that the petition for a writ of habeas corpus be dismissed with prejudice as barred by the one-year limitation period. *See* 28 U.S.C. §2244(d).

Signed this 15th day of January, 2007.



PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

**INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO OBJECT**

The United States District Clerk shall serve a copy of these findings and recommendations on the parties. Pursuant to 28 U.S.C. § 636(b)(1), any party who desires to object to these findings and recommendations must file and serve written objections within ten (10) days after being served with a copy. A party filing objections must specifically identify those findings and recommendations to which objections are being made. The District Court need not consider frivolous, conclusory or general objections. The failure to file such written objections to these proposed findings and recommendations shall bar that party from a *de novo* determination by the district court. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985). Additionally, the failure to file written objections to proposed findings and recommendations within ten (10) days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996)(en banc).